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ABSTRACT

This pamphlet gives an overview of the legal resources currently available to academic women, both for individuals who have experienced discrimination and for groups organizing to deal with patterns of discrimination in educational institutions. The law is discussed in relation to discrimination in employment and admissions. Emphasis is placed on the Civil Rights Act of 1964, the Equal Pay Act of 1963, Constitutional Law, State Law, the Higher Education Act of 1972, the Public Health Service Act, and the Equal Rights Ammendment. Grievance procedures and the process of finding a lawyer are discussed regarding implementation of the law. The Executive Order, issued by President Johnson in 1965, and nepotism rules and practices are highlighted. A bibliography is included. (MJM)

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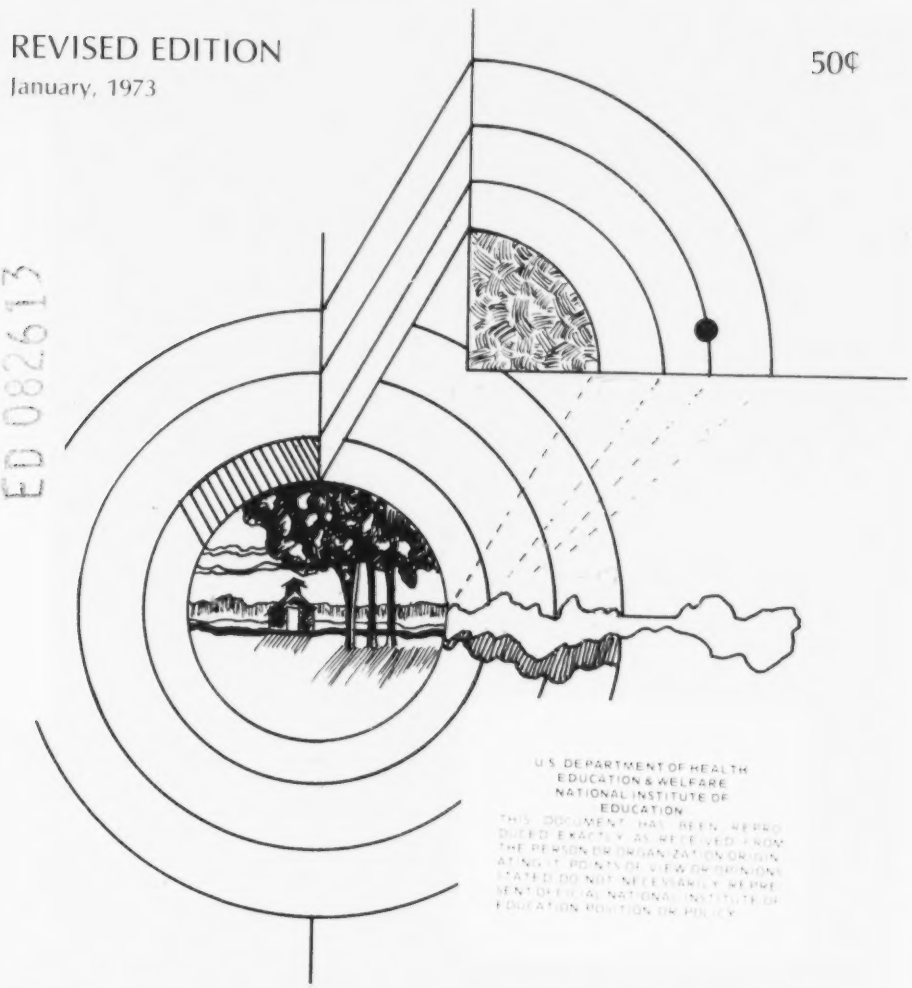

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ACADEMIC WOMEN, SEX DISCRIMINATION, AND THE LAW

AN ACTION HANDBOOK

HE 004 618

Prepared by Adrian Tinsley and Elaine Ruben
For the MLA Commission on the Status of Women

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The Modern Language Association Commission on the Status of Women in the Profession cannot provide legal aid or offer advice in specific cases of sex discrimination. We hope, however, that this pamphlet will be a useful overview of the legal resources currently available to academic women, both for individuals who have experienced discrimination and for groups organizing to deal with patterns of discrimination in educational institutions. Recognizing that the pursuit of equity can be long and difficult, we hope that the information collected here will enable women more confidently to embark upon it.

As with so many documents of the women's movement, this one has drawn upon that movement's collective efforts: when teachers of English can become "experts" on a branch of law it is because lawyers have helped and other academic women encouraged. Our thanks to the many women (and some men) who have shared their experience, and particularly to Bernice Sandler and her associates on The Project on the Status and Education of Women, Association of American Colleges, whose demystifications of the law have been so valuable. The descriptions in this pamphlet of the provisions of the new Federal law were provided by The Project--1818 R Street N.W., Washington, D.C. 20009.

E.R./A.T.

THE LAW

Since Academic Women, Sex Discrimination and the Law appeared last year (December, 1971), the legal situation of academic women who believe they have experienced sex discrimination has changed--radically.

It is fair to say that even last December very little law existed which could cover academic women in sex discrimination cases. Executive Order 11246 as amended by Executive Order 11375 was one instrument faculty women had to put pressure on their colleges and universities, but the Executive Order (see p.11) is not law and it does not permit a woman to go to court if she is not satisfied with the remedy provided by the Department of Health, Education and Welfare. Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, sex and national origin, excluded from coverage last December teachers, administrators in educational institutions, and employees of state and local governments. And the Equal Pay Act of 1963, which requires payment of equal salaries and wages for equal work, excluded from coverage administrative, professional, and executive employees.

But now, suddenly--this has happened since December, 1971--academic women find themselves covered by Federal law in sex discrimination cases.

Title VII, Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 forbids discrimination in employment on the grounds of race, color, religion, sex, or national origin. On March 24, 1972, the Equal Employment Opportunity Act of 1972 extended coverage under Title VII to include employees of state and local governments and educational institutions. Title VII now applies to all educational institutions, both public and private, with fifteen or more employees. All employees are covered, including those subject to state and local civil service laws. Institutions are covered regardless of whether they have any Federal funds. Title VII also covers labor organizations (collective bargaining unions) and employment services.

Title VII makes it unlawful to discriminate in: recruitment, hiring, firing, layoff, recall; wages, terms, conditions or privileges of employment; classifying, assigning, or promoting employees; extending or assigning use of facilities; training, retraining or apprenticeships; opportunities for promotion; sick leave time and pay; vacation time and pay; overtime work and pay; medical, hospital, life and accident insurance coverage; optional and compulsory retirement age privileges; receiving applications or classifying or referring for employment; and printing, publishing, or circulating advertisements relating to employment that express specifications or preferences based on sex.

Religious educational institutions are exempted with respect to the employment of individuals of a particular religion to perform work for that institution. Title VII does not exempt such institutions from the prohibition of discrimination based on sex (or race, color and national origin).

Title VII is administered by the Equal Employment Opportunity Commission, which receives and investigates charges of discrimination. Charges must be filed within 180 days after the alleged discriminatory act has occurred. A copy of the charges filed will be given to the party charged within 10 days of filing. Charges are not made public by the Commission (unless court proceedings ultimately require that records be public).

Once charges have been received, EEOC begins investigation. In certain states which have fair employment laws EEOC automatically refers the charges to the state agency for 60 days. At the end of the 60-day period, EEOC handles the investigation unless the state is actively involved, in which case EEOC may grant an additional 300 days. About 86% of deferred cases return from the state to EEOC for processing.

After investigation the Commission attempts conciliation. Should conciliation fail, the Equal Employment Opportunity Act of 1972 has given EEOC the power to bring a civil action against an uncooperative private institution in an appropriate Federal District Court. However, due to an ambiguity in the law as it relates to public institutions, it is not yet clear whether the Commission or the Attorney General will file suit in situations which involve public educational institutions.

Academic women should note two important features of Title VII now that coverage has been extended to them. It permits complaints charging a pattern of discrimination (pattern complaints are also permitted under the Executive Order). And it grants to an aggrieved party a private right to sue. In other words, if the protection guaranteed in the law which EEOC administers is not forthcoming to the satisfaction of the aggrieved party, she has a right to sue privately in court for damages (there is presently some difference of legal opinion as to whether a private right to sue is permitted under the Executive Order, but under Title VII, a private right to sue is guaranteed in the law). Since it is rumored that EEOC currently has a case backlog of close to three years, you can see how important this private right to sue might be; if EEOC cannot do the job properly, we now have Federal law under which an academic woman can bring a civil action on her own behalf.

The EEOC Sex Discrimination Guidelines and complaint forms can be obtained by writing: Equal Employment Opportunity Commission, 1800 G Street, N.W., Washington, D.C. 20506 or your regional EEOC office.

The Equal Pay Act of 1963

The Higher Education Amendments of 1972 contain a comprehensive series of provisions designed to end discrimination based on sex in all areas of higher education. Among these is an extension of the coverage of the Equal Pay Act of 1963 to executive, administrative and professional employees, including all faculty. The Act states that women and men performing work in the same estab-

lishment under similar conditions must receive the same pay if their jobs require equal skill, effort and responsibility. "Equal" does not mean "identical," but simply that jobs which are compared under the Equal Pay Act have to be substantially similar.

All employees in all private and public institutions at all levels are covered, regardless of whether or not the institution is receiving Federal funds. The Wage and Hour Division of the Employment Standards Administration of the Department of Labor enforces the Act. There is no formal procedure for filing a complaint; one simply writes or telephones the nearest Wage and Hour Office of the Department of Labor. The identity of the complainant is kept in strict confidence and is not revealed unless the case ultimately goes to court.

If investigation indicates a violation has occurred, the employer is asked to comply with the law by raising salaries and awarding back wages to those who were underpaid. More than 95% of the Equal Pay investigations are settled without recourse to litigation, but--should the employer fail to comply--the Department of Labor can bring suit in the appropriate Federal District Court. Individual complainants may also file private suits under the law. When a complaint is held to be valid, employers must raise the salaries of those employees who earned less by reason of their sex, and must award back pay for the period in which they were being paid less (generally speaking, the statute of limitations for back pay is two years).

The virtue of filing a complaint under the Equal Pay Act of 1963 as amended is that the issue (salary and fringe benefits) is clear and the investigation procedure--as of this writing--is relatively speedy. The case backlog is measured in months rather than years. For further information contact Wage and Hour Division, Employment Standards Administration, Department of Labor, Washington, D.C. 20210 or your nearest field, area, or regional Wage and Hour Office.

Constitutional Law: Equal Protection and Due Process

Because there was--before 1972--no Federal legislation and no uniform state legislation which could protect an academic woman in a sex discrimination case, feminist lawyers have argued that sex discrimination (in an educational institution which is an agency of the city or state) would seem to violate the Fourteenth Amendment "due process" and "equal protection" clauses of the United States Constitution. If the educational institution is an agency of the Federal government, sex discrimination on its part would seem to violate the Fifth Amendment to the U.S. Constitution. For example, a lower court ruled that the exclusion of women applicants from the all-male campus of the University of Virginia was denial of equal protection under the Fourteenth Amendment because the facilities available to women were not equal (Kirsten v. Rector and Visitors, 1970). There is considerable pending litigation on Constitutional grounds involving the job rights of pregnant secondary school teachers: the Richmond, Virginia, school system, for example, has recently been found in violation of the Fourteenth Amendment on maternity policy.

Unfortunately, the Supreme Court has failed to interpret the equal protection and due process guarantees of the Fifth and Fourteenth Amendments as prohibiting separate classifications for men and women under the law. One criterion (the "reasonableness" test) has been used to determine whether Constitutional provisions against sex discrimination have been violated while a different criterion (the "compelling interest" test) is used with respect to racial discrimination. The Supreme Court has consistently maintained that classification by sex is reasonable, which means that legislation may be constitutional even though it singles women out for special treatment or applies to one sex only. In Williams v. McNair (1971), the Supreme Court held that sex-segregated colleges are not a violation of the Fourteenth Amendment and that separate legislative classification on the basis of sex is reasonable for purposes of education. Reed v. Reed (1971) is the first case in which the Supreme Court did find (Nov. 22, 1971) that a state law which preferred men over women (as administrators of estates) violated the Fourteenth Amendment, but this ruling was made on extremely narrow grounds.

Because it is so difficult to prove sex discrimination (especially to male judges), most cases which go to court are filed on due process grounds: that is, proper procedures have not been followed by the defendent in the case of the complaining woman. Some suits brought on due process grounds by women (and men) in higher education, and now pending, charge lack of due process for untenured faculty members in matters of reappointment and promotion to tenure. In some cases plaintiffs are arguing that tenure proceedings should be modified to permit the candidate to appear before the tenure committee to answer questions and to defend his or her record against charges made against it. There is growing support for the view that due process requires a written explanation to the non-reappointed candidate of the reasons for his non-reappointment. The AAUP's Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments (1971) takes the position that an explanation of non-reappointment should be provided in writing if the non-reappointed faculty member requests it. In Drown v. Portsmouth, 435 F.2d 1182, Judge Coffin of the First Circuit said:

> We therefore hold that the interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantage for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file.

On the other hand, an academic woman recently lost a case in Federal District Court which illustrates recourse to the Fifth and Fourteenth Amendments, especially to the due process guarantee. It involved an untenured assistant professor on renewed one-year appointments at a state university whose contract was unexpectedly terminated. She brought suit against the Chancellor, the Dean of the College of Arts and Sciences, the Chairman of her Department, and the members of the Department's Committee on Tenure and Promotion. The grounds of her charge were as follows:

> . . . the failure of all defendents to provide plaintiff with any appeal remedies to the sum-

mary decision of the Committee on Tenure and Promotion . . . was a denial of due process of law and unconstitutional under the Constitution of the United States of America, specifically the Fifth and Fourteenth Amendments thereto, in that defendents have deprived plaintiff of her right to be heard in defense of her reappointment, her right to cross-examine witnesses or other evidence against her, her right to be represented by counsel, her right to seek appeal from such a summary and ex parta decision, all of which constituted a deprivation by the defendents of plaintiff's constitutionally protected personal and property interests in reemployment and of her right to seek and maintain employment devoid of constitutionally impermissible reasons.

The plaintiff in this case asked that the tenure regulation which states that it is not necessary for a non-reappointed appointee to be provided with reasons for his non-reappointment be declared unconstitutional; she lost.

The Supreme Court, too, has recently refused to rule that the due process guarantees of the Fifth and Fourteenth Amendments apply to untenured teachers.

In Board of Regents v. Roth, a Supreme Court majority (5 - 3) rejected the contention that all teachers are entitled to a statement of reasons at the hearing prior to nonrenewal under the due process clause of the Fourteenth Amendment. A majority also rejected the claim that a non-tenured teacher is entitled to a due process hearing when he asserts that the non-renewal is a reprisal for his exercise of First Amendment rights. Such a claim entitles a teacher to a judicial hearing, not to an administrative hearing. In Perry v. Sindermann, the Court stated: "The Constitution does not require opportunity for a hearing before the nonrenewal of a non-tenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in 'liberty' or that he had 'property' interest in continued employment, despite the lack of tenure or a formal contract." For further information see William Van Alstyne, "The Supreme Court Speaks to the Untenured: A Comment on Board of Regents v. Roth and Perry v. Sindermann," AAUP Bulletin, v. 58, no. 3, September, 1972, pp. 267-278.

State Law

Again, because no Federal legislation existed--before 1972--to protect an academic woman in a sex discrimination case, many women turned to Fair Employment Practices Laws in their individual states. On November 1, 1971, 33 states and the District of Columbia had enacted laws prohibiting discrimination based on sex in employment. These Fair Employment Practices Laws have typically excluded from coverage the same categories of people (teachers, administrators in educational institutions, employees of state and local governments) as were excluded under Title VII, so they have not on the whole been helpful to academic women; now that Title VII has been amended, this situation is likely to change.

On November 1, 1971, thirty-six states had equal pay laws which might be applicable to cases of sex discrimination in pay by educational institutions. Following the Equal Pay Act of 1963, executive, administrative and professional employees have been, in some states, excluded by coverage; again, now that coverage under the Equal Pay Act has been extended, this situation is likely to change.

As of July 1970, 48 states, the District of Columbia, six municipalities, and the Territory of the Virgin Islands had Commissions on the Status of Women. A list of the chairwomen of these Statutory Commissions may be obtained from the Women's Bureau, Department of Labor, Washington, D.C. 20210. You can also write directly to your Governor for information about the laws in your state as they affect academic women and your state's enforcing agencies.

DISCRIMINATION IN ADMISSIONS

Academic women seeking change on their individual campuses have often turned first to their own problems as professional women and addressed themselves--usually through the Executive Order--to sex discrimination in recruiting, hiring, promotion, tenure and salary. The Executive Order is directed towards discrimination in employment, not towards other areas of academic life, and the same is true of the extended coverage provided in 1972 by Title VII and the Equal Pay Act. Discrimination in admissions, however, has been an equally serious problem to women; it is just now beginning to be the subject of Federal legislation.

The Higher Education Act of 1972

In addition to extending coverage of the Equal Pay Act of 1963 to executive, administrative, and professional employees, including faculty, the Higher Education Act of 1972--effective July 1, 1972--prohibits sex discrimination in all Federally assisted education programs. The basic provision of Title IX of the Higher Education Act states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." All institutions (including public and private pre-schools, elementary and secondary schools, institutions of vocational, professional, undergraduate and graduate education) which receive Federal monies by way of a grant, loan or contract (other than a contract of insurance or guaranty) are covered.

Discrimination in admissions is prohibited in vocational institutions, institutions of professional education, institutions of graduate higher education, and public undergraduate co-educational institutions; this admissions provision goes into effect on July 1, 1973.

Exemptions from the admissions provision are as follows: private undergraduate institutions of higher education; single-sex public undergraduate institutions; elementary and secondary schools other than vocational schools; and schools in transition from single-sex to co-education. Schools of vocational,

professional, or graduate education, or public undergraduate education, which are beginning the transition to co-education are exempt from the admissions provision, provided they are carrying out a transitional plan approved by the Commissioner of Education. Institutions controlled by religious organizations are exempt if applying the admissions provision is not consistent with the religious tenets of the organization. Schools whose primary purpose is the training of individuals for the military service of the United States or the Merchant Marine are also exempt.

The Federal Departments empowered to extend aid to educational institutions have the enforcement responsibility for Title IX of the Higher Education Act; they delegate their enforcement powers to the Office for Civil Rights, Department of Health, Education and Welfare (the office which conducts compliance reviews and investigations). The complaint procedure is not yet specified; a letter to the Secretary of HEW is acceptable. Complaints of a pattern of discrimination can be made as well as individual complaints. If a violation is found, informal persuasion is first attempted; if persuasion fails, awards may be delayed or revoked and the institution may be declared ineligible for future awards. The Department of Justice may bring suit at the request of HEW.

For further information contact the Division of Higher Education, Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C. 20201 or your regional HEW office.

The Public Health Service Act

The Comprehensive Health Manpower Act and the Nurse Training Amendments Act of 1971 amended Titles VII and VIII of the Public Health Service Act to provide, in essence, that the Secretary of Health, Education and Welfare may not make any Federal monies available under either Title VII or Title VIII unless the application for such monies contains an assurance that the grantee will not discriminate on the basis of sex. Titles VII and VIII cover programs for schools of medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, podiatry, allied health professions, and nursing schools.

The effective date of the amendments is November 18, 1971. All institutions receiving or benefiting from a grant, loan guarantee, or interest subsidy to health personnel training program or receiving a contract under Titles VII or VIII of the Public Health Service Act are covered. Notice that what is at issue here is discrimination in admission of students on the basis of sex.

For further information contact the Division of Higher Education, Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C. 20201 or your regional HEW office.

The Equal Rights Amendment

As of December 1, 1972, the Equal Rights Amendment to the U.S. Constitution had been ratified by 22 states; thirty-eight are needed for adoption. When the ERA is adopted, state-supported schools at all levels will be required to eliminate all laws or regulations or official practices which exclude women or limit

their numbers. The amendment will not require quotas for men and women, nor will it require that schools accurately reflect the sex distribution in the population; rather admission will turn on the basis of ability or other relevant characteristics, and not on the basis of sex. Scholarship funds will be treated in the same way. State schools and colleges currently limited to one sex will have to allow both sexes to attend. Employment and promotion in state schools and colleges will have to be free from sex discrimination.

HOW TO USE THE LAW

Even though the MLA Commission on Women is not in a position to offer specific legal advice in individual cases, we would like to offer two suggestions to the academic woman who believes she has encountered sex discrimination. The first is that she should, if at all possible, press her individual sex discrimination case in the context of a strong, organized campus women's group which is also pressing HEW, EEOC, the Department of Labor and the local institution for a complete review of employment policies and practices relating to women at all levels, professional and non-professional, staff and student.

The second is that she should, as she surveys the various options open to her--campus grievance channels, AAUP, state and local human relations commissions, the Executive Order, Title VII of the Civil Rights Act of 1964, the Equal Pay Act, litigation in the courts--try very hard to press her case at several of these levels simultaneously. Under much of the legislation described in this pamphlet, an individual complaint must be filed within 180 days from the date the discrimination occurred. Depending on the nature of the complaint, it is perfectly possible to file with HEW, EEOC and the Wage and Hour Division of the Department of Labor simultaneously--and we recommend it.

Two other pieces of practical advice occur to us: get everything in writing, and seek counsel from the feminist sources described below before any final strategy decisions are made. Although we are not in this pamphlet discussing collective bargaining we are aware of the possibilities it offers and wish to point out that women are becoming increasingly active in unions on their campuses; collective bargaining offers women yet another way to begin to effect institutional change.

Grievance Procedures

Local grievance channels in the Department and on the local campus will obviously be a first recourse. The woman who believes she has experienced sex discrimination should be aware that local grievance channels usually deal with procedural issues (this is partly because sex discrimination is difficult to prove in an individual case and partly because conciliators and adjudicators are usually male). Additionally, local campus grievance procedures

normally go up to the administration rather than to an impartial arbiter. It is important to use local channels--first in order to demonstrate that one has tried all available remedies, and second to generate pressure on campus for a review of existing grievance procedures. But a woman contemplating filing an individual complaint under Federal law should remember that she must do so within 180 days.

Sex discrimination complaints are not specifically covered by the grievance procedure policy of AAUP as set forth by section 15 of Recommended Institutional Regulations on Academic Freedom and Tenure (1968) and by Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments (1971). Margaret Rumbarger, Associate Secretary of AAUP, advises that if a woman faculty member has a complaint relating to her status as a faculty member, the local chapter or, if necessary, the national office of AAUP can inform her whether any of the Association's promulgated policies relating to academic freedom, tenure and due process appear to have been violated in her case. The national office of AAUP may express its concern directly to the administration of the local institution, but the usual procedure is for the national office to assist the complainant in presenting her complaint locally. Although Recommended Institutional Regulations, section 15, recommends that local grievance committees consist of elected tenured faculty members, neither Committee W nor the Committee on Nontenured Faculty endorses this policy. AUUP is presently working on new recommendations in this area.

The reactivation of Committee W of AAUP on the Status of Women in the Academic Profession, and the proliferation of local Committee W's (which in some cases also work on a state-wide basis through state conferences of AAUP chapters) is promising. Many local Committee W's have already published studies of conditions for women on their campuses and recommendations for reform. Most local Committee W's, however--like most local AAUP chapters--have handled individual complaints of sex discrimination in an advisory and mediative way, dealing for the most part with procedural questions rather than with the substantive merits of the case.

Alice Rossi, Chairman of the Committee W nationally, writes:

> I shall urge the Committee to recommend strongly that the Association make a firm demand that colleges and universities establish whatever grievance procedures are lacking on local campuses to facilitate the processing of complaints from women faculty members, with a strong recommendation that such grievance committees include women in proportion to their representation on the faculty, including all part-time, nontenured, and lower rank personnel where so many women have been kept. (AAUP Bulletin, Summer, 1971)

The American Association of University Women does not work with specific complaints, but, like Committee W of AAUP, it has made recent policy statements on anti-nepotism regulations, the status of part-time faculty, and maternity leave. See Standards for Women in Higher Education (Summer 1971) available from AAUW, 2401 Virginia Avenue, N.W., Washington, D.C. 20037.

Finding a lawyer

So few cases of sex discrimination have been decided in the courts that there are as yet few precedents, and thus little evidence as to whether the laws which exist can be effective if evoked. And there are not many lawyers who have substantial experience in the area of women's rights law. What this means for a woman with a grievance is that first, she ought to learn as much as possible about the law from feminists (not necessarily, but preferably lawyers) who have had occasion to find out about laws relevant to women, and that second, hiring a feminist attorney is a good idea.

One way to reach such attorneys is through local chapters of national feminist groups such as NOW and WEAL. Other local groups interested in the law as it affects women will vary from area to area. In Washington, D.C., for example, Human Rights for Women, Inc., 1128 National Press Bldg., Washington D.C. (202-737-1059) provides volunteer attorneys who can give legal advice and assistance. The Women's Legal Defense Fund, 2414 37th Street, N.W., Washington, D.C. 20027 (202-338-7425) provides free counsel for women and women's organizations, screens and selects test cases to take to court, and provides para-legal training to non-lawyer volunteers to enable them to assist in the casework.

A second way to find a feminist attorney is through the American Civil Liberties Union. ACLU's chief interest is in test cases with class implications, particularly in cases involving the Bill of Rights and the First Amendment. A local chapter should be able to tell you which lawyers handle its cases. However, An ACLU lawyer who gets a referral through the local chapter and cannot take the case gratis is forbidden to take it for payment, a fact you should bear in mind if you want an ACLU lawyer and are able to pay the normal fees.

Still a third way to reach feminist attorneys is through a law school which harbors professors and students with a strong interest in women's rights law. A professor who is teaching a law course in this field or a women's group within the law school may have useful contacts. In most localities a few good initial contacts will lead an interested woman fairly quickly to most of the resources available in her area.

The Barnard Women's Center is developing a list of legal services available to women in the New York area and nationwide. Write the Women's Center, Barnard College, 606 West 120th St., New York, N.Y. 10027. Lee Ellen Ford has just published (1972) a Directory of Women Attorneys in the United States. It is available ($10) from Ford Associates, Inc., 701 South Federal Ave., Butler, Indiana 46721 (ask your library to order it).

A plaintiff who takes a case to court and wins it normally wins the court costs and attorney's fees plus damages if she sues for them. Attorneys sometimes work for a percentage of the damages recovered. Information about financial prospects in any particular case--probable length of court action, probable cost, risk, possibilities for financial aid--can best be obtained from local contacts as suggested above. A woman who makes less than $200 per month for one individual, plus $40 for each dependent, is eligible for free OEO Legal Aid, but most academic women are not that poor--yet. If ACLU takes a case there is

no charge to the plaintiff, and this is true of most other defense funds, but most defense funds look for cases which stand a chance to make new law. Both NOW and WEAL at the national level have legal committees which solicit precedent-making cases and funds to take them to court. Members of these national committees are in a position to offer counsel to an individual academic woman and to provide referrals when necessary; they can also provide counsel to attorneys who are as yet inexperienced in the area of women's law. Contact:

Sylvia Roberts, President
Legal Defense and Education Fund, NOW
P.O. Box 3081
Baton Rouge, Louisiana 70821
(504) 343-0168 (office)
(504) 342-0940 (home)

WEAL National Office
621 National Press Building
Washington, D.C. 20004

THE EXECUTIVE ORDER

Executive Order 11246, issued by President Johnson in 1965, forbids discrimination in employment by all Federal contractors on the basis of race, color, religion or national origin. As amended by Executive Order 11375, effective October, 1968, discrimination based on sex is also forbidden.

All those who receive Government contracts or subcontracts in excess of $10,000 (which includes virtually all institutions of higher education) must agree not to discriminate on the grounds listed--the "nondiscrimination requirement" of the Executive Order. They must also agree to

> . . . take affirmative action to ensure that applicants are employed and employees are treated during employment without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship . . .

--the "affirmative action" requirement of the Executive Order. These equal employment opportunity obligations apply to <u>all</u> employment by the contractor, and not solely to employment associated with the receipt or use of Federal funds, i.e., in the case of colleges and universities, the entire institution, not solely the department or project receiving Federal money.

It is important to understand that the Executive Order is not law, but a set of terms in a contractual agreement between the Federal Government and its contractors. The Executive Order's requirements are implemented by

regulations of the Department of Labor, whose Office of Federal Contract Compliance is responsible for their enforcement. OFCC has designated the Department of Health, Education and Welfare as the Compliance Agency for all contracts with colleges and universities; HEW's Office for Civil Rights conducts reviews and investigations, and on the basis of its findings Federal contracts may be cancelled, terminated or suspended.

It was this penalty--however distant and rarely invoked--as well as the absence of more direct legal channels, which led women to file individual and institutional complaints under the Executive Order during recent years. The fact that the Executive Order is an administrative, and not a judicial, mechanism has various consequences; probably most crucial to women, those "discriminated against" are not formally parties to the procedures involved. The Executive Order as originally issued was not intended to deal with sex discrimination, and its original implementing regulations dealt with general labor concepts and practices, not those of the academic world; for these reasons, as well as the lack of sufficient staff within HEW to deal with the sheer size of its assignment (individual complaints were particularly neglected), women were often more frustrated than satisfied by the coverage and enforcement provided. In most cases, institutional changes came from the threat of penalty and the political pressure of women organized around a complaint, not directly from the efforts of compliance officers.

In June, 1970, the Office of Federal Contract Compliance first issued Sex Discrimination Guidelines, which indicated that employers are required to "take affirmative action to recruit women to apply for those jobs where they have previously been excluded." These brief Guidelines prohibited contractors from:

1. Making any distinction based upon sex in employment opportunities, wages, hours, or any other conditions of employment.

2. Making any distinction between married and unmarried persons of one sex unless the same distinctions are made between married and unmarried persons of the opposite sex.

3. Denying employment to women with young children unless the same exclusionary policy exists for men; or terminating an employee of one sex in a particular job classification upon reaching a certain age unless the same rule is applicable to members of the opposite sex.

4. Penalizing women in their conditions of employment because they require time away from work for childbearing. Whether or not the employer has a leave policy, childbearing must be considered a justification for leave of absence for a reasonable length of time.

5. Maintaining wage schedules related to or based on the sex of the employees, or discriminatorily restricting one sex to certain job classifications.

Other provisions dealt with protective labor laws and physical facilities, concerns of women in the construction fields to which the Executive Order had originally been addressed; no provision in these guidelines dealt with nepotism, a particular concern of academic women.

In December, 1971, the Secretary of Labor signed a further amendment to the Code of Federal Regulations, known as "Revised Order 4." This order applied to non-construction contractors the requirement that those Federal Contractors with contracts of $50,000 or more, employing more than 50 persons, must have on file a written affirmative action program, which determines whether minorities and women are underutilized in their work force (underutilization is defined in the regulations as "having fewer women or minorities in a particular job than would reasonably be expected by their availability") and projects detailed and specific goals and timetables for remedying these underutilizations.

As originally issued the regulations exempted public institutions from the obligation of a written plan, although the procedures for compliance reviews called for essentially the same sorts of information as required in the written plans of private institutions. By the end of 1972 the Department of Labor intends to require written affirmative action plans of all institutions.

In October, 1972, the Office for Civil Rights of HEW issued its Higher Education Guidelines to colleges and universities, spelling out their obligations under Revised Order 4, with detailed instructions on the development of affirmative action programs for women. Topics covered under personnel policies and practices, e.g., include recruitment; hiring; anti-nepotism policies; placement, job classification, and assignment; training; promotion; termination; conditions of work; rights and benefits--salary; back pay; leave policies; employment practices relating to pregnancy and childbirth; fringe benefits; child care; grievance procedures. Other sections of the Guidelines deal with data gathering and analysis, models for setting goals and timetables, etc. In many ways it is evident that these guidelines have profitted from the input of women's groups; in general their provisions are sensitive to the particular problems of sex discrimination in higher education, and intelligent about remedies for them.

The Guidelines were first distributed at the annual meeting of the American Council on Education; administrators returned home from that meeting to their task of preparing their campuses written affirmative action programs for women. These programs, to be updated at set intervals, are reviewed by HEW's Office for Civil Rights on that office's initiative, as part of routine, regular programs of systematic review, prior to the awarding of any Federal contract for $1 million or more, and upon complaints "seeking relief for an affected class as well as general allegations of patterns of discrimination at an institution." Individual complaints are now dealt with by the U.S. Equal Employment Opportunities Commission under the provisions of Title VII of the Civil Rights Act of 1964--see p. 1).

For concerned campus women, the tasks are now two-fold: to continue, where appropriate, to file complaints, and to be actively involved in the creation and monitoring of the affirmative action program itself. Complaints can be filed with:

Office of Federal Contract Compliance
Department of Labor
Washington, D.C. 20210
or
Office for Civil Rights
Department of HEW
Washington, D.C. 20201
or
with the regional offices of either department.

As we did last year, we recommend letters to the Department of Labor and HEW's Secretaries and to your Congressmen and Senators, Regents and newspapers--if only to keep them sensitive to these issues. More information on the filing of complaints is available from:

Norma Raffel (Chairwoman, Action
610 Glenn Road Committee on Federal
State College, Pennsylvania 16801 Contract Compliance, WEAL)

It is extremely important that women to continue to organize strong local campus groups to file complaints under the Executive Order that a pattern of discrimination exists on campus; in spite of its weaknesses in coverage and enforcement, it has been until this time the only instrument faculty women have had to put pressure on their colleges and universities to upgrade all women employees, to recruit women for faculty positions, to promote and pay women equally with men, and to raise the number of women admitted to all levels of higher education.

The second task--to be actively involved in the creation and monitoring of affirmative action plans--is critical for campus women now. On some campuses input from women's groups has been solicited; on others the struggles are still to gain access to information and decision-makers. Each unit must have an executive responsible for equal employment opportunity programs; he or she, and your regional compliance officer, are people to know. The Office for Civil Rights "urges" institutions to make public their affirmative action programs, and will, under the Freedom of Information Act, itself disclose those which have been accepted.

Affirmative action campus-wide clearly involves more women than those in the modern languages, and, for that matter, more than just academic women; effective women's groups have been as broad based, at least in their contacts, as local situations permit. Women in the modern languages will, however, have particular departmental concerns, for which the Affirmative Action Guidelines of the MLA Women's Commission (PMLA, May, 1972) may be of use. The most recent HEW Guidelines for Revised Order 4 permit goals and timetables to be set unit-wide, rather than departmentally, and consider students only in their role as employees; departmental goals and timetables, and questions, e.g., of graduate admissions and awards, may need the particular attention of women in the modern languages. (Such matters, and others dealing with education, rather than employment, may be legally dealt with under the provisions of the Higher Education Act; see p.6).

Despite its limitations, the Executive Order offers means for women to deal, through channels and outside, with broad patterns of institutional sexism. This second stage of its history (for women) should be an interesting one; the third, more distant, may involve finding still more direct legal means to enter into the process of affirmative action, or to challenge its results--possibly court cases under the amended provisions of Title VII of the Civil Rights Act of 1964, (see p. 1).

NEPOTISM RULES AND PRACTICES

Nepotism rules and practices take all sorts of forms. The commonest is to prohibit hiring "members of the same family" or "relatives" in the same department, but it is also quite common to prohibit hiring relatives within the same college or university or even within the same state system. Unacknowledged, informal anti-nepotism practices are even more common. See Study II by the MLA Commission on Women for an estimate of the number of Ph.D. granting departments of English and Modern Languages which presently acknowledge that they possess written nepotism regulations or adhere to anti-nepotism practices.

Whatever the stated rationale for nepotism rules and practices their primary effect is to prohibit, or to restrict to inferior terms, the employment of wives of administrators and faculty members. Where nepotism policies do not altogether halt the careers of married women, they hinder them, and at the same time allow institutions to get able, often fully qualified, professional help at reduced rates. Institutions with nepotism rules and policies typically do employ wives--as laboratory assistants, for example, or language instructors or teachers of freshman composition, on inferior terms, not as ordinary career appointments; wives may work--part-time only or without promotion or tenure or sabbatical leave or fringe benefits or the right to vote in department meetings or in faculty meetings.

Committee W of AAUP drafted last year the following Statement on Faculty Appointment and Family Relationship: it was endorsed by the Board of Directors of AAUP in June, 1971:

> In recent years, and particularly in relation to efforts to define and safeguard the rights or women in academic life, members of the profession have evidenced increasing concern over policies and practices which prohibit in blanket fashion the appointment, retention, or the holding of tenure of more than one member of the same family on the faculty of an institution of higher education or of a school or department within an institution (so-called "anti-nepotism regulations"). Such policies and practices subject faculty members to an automatic decision on a basis wholly unrelated to academic qualifications and limit them unfairly in their opportunity to practice their profession. In addition, they are contrary to the best interests of the institution which is deprived of qualified faculty members on the basis of an inappropriate criterion, and of the community which is denied a sufficient utilization of its resources.
>
> The Association recognizes the propriety of institutional regulations which would set reasonable restrictions on an individual's capacity to function as judge or advocate in specific situations involving members of his or her immediate family. Faculty members should neither initiate nor participate in institutional decisions involving a direct benefit (initial appointment, retention, promotion, salary, leave of absence, etc.) to members of their immediate families.
>
> The Association does not believe, however, that the proscription of the opportunity of members of an immediate family to serve as

> colleagues is a sound method of avoiding the occasional abuses resulting from nepotism. Inasmuch as they constitute a continuing abuse to a significant number of individual members of the profession and to the profession as a body, the Association urges the discontinuance of these policies and practices, and the rescinding of laws and institutional regulations which perpetuate them.

AAUW's new guideline on this subject calls for the elimination of nepotism regulations and a written statement of institutional policy to establish clear standards of appointment on merit since "policies and practices which proscribe the opportunity of members of an immediate family are recognized as contrary to the best interests of both the institution and the individual."

Affirmative action in this area is very much in progress. To cite just a few examples, Ohio State University changed its policy in February, 1971, the University of Wisconsin in June, 1971. The university of Michigan, Yale University, and the University of Maryland, College Park, now permit members of the same family to teach in the same department. The section on nepotism has been deleted from the Policies of the Board of Trustees for the entire State University of New York.

If an educational institution--whether state system, university, college, or individual department--persists in retaining either written or unwritten nepotism policies, an individual woman can fight in three ways: through local campus efforts to effect institutional change; through recourse to Executive Order 11246 as amended; and through recourse to lawsuit.

Local Campus Efforts to Effect Institutional Chang.

First, it is necessary to research the subject on your campus. Where does anti-nepotism originate? Is there a written rule? An agreed-on policy? Is anti-nepotism practiced in some departments only or throughout the institution? Who has the power to sustain anti-nepotism policy? Or to rescind it? Is anti-nepotism policy administered with equity? Has it been applied in some cases but not others? Is it applied more strictly to wives than to other members of the same family? What evidence can you gather of professional hardship experienced by fully qualified wives because of anti-nepotism policy? What evidence can you gather of economic exploitation? Finally, what defenses do administrators and faculty members give of anti-nepotism policy?

Your local situation will affect your choice of tactics. Administrations or governing boards which are willing to cooperate can be asked to lend influence and practical support to research, education, and change. Statements of positive policy, and continuing pressure to ensure reform, could be provided by faculty assemblies or senates to effect similar ends. An AAUP committee could serve as an agency for research and for affirmative action. The new policy statements by AAUP and AAUW provide new sources of professional support.

The Executive Order

In the new Higher Education Guidelines, the Office for Civil Rights, HEW, has ruled that "policies or practices which prohibit or limit the simultaneous employment of two members of the same family and which have an adverse impact upon one sex or the other are in violation of the Executive Order." Because men have traditionally been favored in employment over women, anti-nepotism regulations in most cases operate to deny employment to a wife rather than to a husband. Anti-nepotism rules, then, whether written or unwritten, must be eliminated or rewritten to insure that non-relevant criteria (such as marital status) shall not be applied in hiring or promoting university personnel. One of HEW's requirements at the University of Michigan was that the university "develop a written policy on nepotism which will insure correct treatment of tandem teams."

Institutional regulations which set reasonable restriction on an individual's capacity to function as judge or advocate in specific situations involving a member or his or her immediate family are permissible where they do not have the effect of denying equal employment opportunity to one sex over the other; see the AAUP policy statement above.

A woman who complains under Executive Order 11246 as amended that she was denied employment or was given a status not warranted by her qualifications because of the existence of a nepotism rule may demand compensatory back wages to October 13, 1968, the effective date of the Executive Order. She should be aware, however, that HEW is presently referring individual complaints to EEOC. Individual complaints are usually made most effectively in the context of a complaint that a pattern of discrimination operates throughout the entire college or university.

A Suit in Court

Nepotism rules are probably unconstitutional. During 1969-70, five women whose careers either were, or were potentially, hindered by the Arizona Board of Regents' nepotism regulation and its administration at the University of Arizona in Tucson decided to become plaintiffs in a declaratory judgment action. Their attorney filed a class action that demanded (in the legal sense of the word) that the Regent's regulation be declared invalid as formulated and administered because it discriminated against women.

The plaintiffs' attorney advanced numerous grounds for relief:

1. unreasonable abridgement of the fundamental constitutional right to marry whom one chooses;

2. unreasonable abridgement of the fundamental constitutional right to pursue a lawful livelihood;

3. violation of due process and equal protection of the laws by the vague and arbitrary formulation of the rule;

4. violation of due process and equal protection of the laws by the arbitrary and capricious administration of the rule.

After seven months of preparatory litigation, the State's attorney's office advised the Regents that their anti-nepotism regulation was probably constitutionally indefensible; the Regents thereupon rescinded the regulation, and the plaintiffs' suit was subsequently dismissed as moot.

At the present time several lawsuits are planned against treatment discriminatory to women because of nepotism rules in colleges and universities. Heather Sigworth, who initiated the suit against the University of Arizona Board of Regents described above, is bringing suit against the University of Arkansas; this action is sponsored jointly by WEAL and ACLU. Ms. Sigworth is arguing that nepotism rules constitute de facto sex discrimination. She believes that once it is clearly established that nepotism rules constitute sex discrimination, several constitutional remedies will be available, particularly the constitutional right to pursue a lawful livelihood and the constitutional right to marry whom one chooses. A packet of information about nepotism rules (the background of these rules, arguments used to justify them, and arguments against them) is available. Write:

Heather Sigworth
3537 North Jackson Ave.
Tucson, Arizona 85719
18¢ for third-class mailing
56¢ for first-class mailing

(WEAL Subcommittee
Against Nepotism Rules)

BIBLIOGRAPHY

Books

Kanowitz, Leo. Women and the Law: The Unfinished Revolution. Albuquerque: University of New Mexico Press, 1969.

Symposium--Women and the Law. Valparaiso University Law Review. Vol. V, No. 2, 1971. ($4.00 from the School of Law, Valparaiso, Ind. 46383).

Pamphlets

Higher Education Guidelines, Executive Order 11246
Public Information Office
Office for Civil Rights
Department of Health, Education and Welfare
Washington, D.C. 20201
OR
From the regional Office for Civil Rights in your area

You ought to have your own copy of these indispensable guidelines. Attached as appendices are all other civil rights laws affecting institutions of higher education over which the Office for Civil Rights has enforcement responsibility. Appendices are:

- Executive Order 11246, as amended
- Obligations of Contractors and Subcontractors
- Revised Order No. 4
- Sex Discrimination Guidelines
- Employee Testing
- Title VI of the Civil Rights Act of 1964
- Title IX of the Education Amendments of 1972 and Memorandum to Presidents of Institutions of Higher Education
- Title VII of the Civil Rights Act of 1964
- OCR Compliance Procedures
- Data Gathering and Analysis

Federal Laws and Regulations Concerning Sex Discrimination in Educational Institutions (October, 1972). Available (poster size) from HEW at the address listed above or you can write to the Project on the Status and Education of Women, Association of American Colleges, 1818 R St. N.W., Washington, D.C. 20009. You should make sure that you are on the Project's mailing list. Ask for a current packet of materials. Reports on the law are issued frequently.

Newsletters

Concerns (Newsletter of the Women's Caucus for the Modern Languages). $5.00 per year dues to: Leonora Woodman, Secretary-Treasurer, WCML, 1100 N. Grant Street, West Layfayette, Indiana 47906.

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Additional copies of this pamphlet available from Adrian Tinsley, William James College, Allendale, Michigan, 49401 or write to Elaine Hedges, Chairwoman, MLA Commission on Women, Department of English, Towson State College, Baltimore, Maryland 21204. Send 50c per copy to cover postage and printing costs.

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